

NO. 5:12-CV-592-FL

Defendants.

ORDER

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(See Compl. ¶¶ 61-95). On November 30, 2012, defendant Kight moved to dismiss all claims brought against him, (DE 22), and defendant Kight's Medical Corp. filed an answer to the complaint. (DE 24). On April 26, 2013, the court entered a consent order of dismissal with prejudice, which stated that the parties consented to dismissal of the following claims as against defendant Kight individually: (1) First Cause of Action - wrongful discharge under the ADA, (2) Second Cause of Action - retaliation under the ADA, and (3) Fifth Cause of Action - wrongful discharge in violation of public policy. (DE 36 at 2).

As an initial matter, as noted in the M&R, the court notes there is a discrepancy in the conclusion paragraph of the consent order, which states in contrast to the above representation that plaintiff's First, Second, and Third causes of action against defendant Kight are dismissed with prejudice. (Id.) In accordance with the parties' stated intention regarding dismissal of the First, Second, and Fifth causes of action, in conjunction with the statement in the consent order that plaintiff does not consent to dismissal of her Third and Fourth causes of action, as confirmed in the M&R to which no objections were lodged, the court hereby AMENDS and CLARIFIES its April 25, 2013, consent order to state as follows in the concluding paragraph:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's First Cause of Action, Second Cause of Action, and Fifth Cause of Action as against Defendant Kight individually are hereby dismissed with prejudice.

With respect to plaintiff's two remaining claims against defendant Kight individually, plaintiff's Third and Fourth cause of action under the FLSA and NCWHA, it was determined in the M&R that these claims should be allowed to proceed, where plaintiff sufficiently alleged facts establishing that defendant Kight is an "employer" for purposes of the FLSA and NCWHA. (M&R

5-8). As discussed more particularly in the M&R, this conclusion is supported by the factors set forth by this court in Garcia v. Frog Island Seafood, Inc., 644 F. Supp. 2d 696, 707 (E.D.N.C. 2009). Upon careful review of the M&R and of the record generally, having found no clear error, the court hereby ADOPTS the recommendation of the magistrate judge (DE 37) as its own, and, for the reasons stated therein, defendant Kight's motion to dismiss (DE 22) is DENIED.

In sum, plaintiff's claims asserted against defendant Kight's Medical Corp., and plaintiff's Third and Fourth causes of action against defendant Kight individually, remain outstanding. Deadlines and requirements for continued management of this case shall be maintained as set forth in the court's March 13, 2013, case management order (DE 31).

SO ORDERED, this the 27th day of August, 2013.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

LOUISE W. FLANAGAN
United States District Judge